

**Interagency Task Force Report on
Agency Recommendations, Conditions, and
Prescriptions Under Part I of the Federal Power Act**

– Draft Interagency Deliberative Document –

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INTRODUCTION

Under Part I of the Federal Power Act of 1935, as amended (FPA), the Federal Energy Regulatory Commission (FERC) is responsible for determining whether, and on what conditions, to issue licenses for the construction, maintenance, and operation, or continued operation, of non-federal hydropower facilities. As part of the FERC licensing process, federal resource agencies are responsible for providing conditions, prescriptions, and recommendations to protect natural and trust resources, including fish and wildlife and federal reservations. The federal resource agencies have both overlapping and different authorities under the FPA for conditions, prescriptions, and recommendations, as explained below.

This report examines ways to clarify and coordinate procedures for incorporating resource agency recommendations, conditions, and prescriptions in the hydroelectric licensing process. It is comprised of three sections: 1) mandatory conditions and prescriptions (Sections 4(e) and 18); 2) agency recommendations (Section 10(j)); and 3) other issues. Where possible, the report offers solutions to help resolve issues and improve the licensing process.

SECTION 1: MANDATORY CONDITIONS AND PRESCRIPTIONS

Potentially, confusion and contention in the licensing process may result from the resource agencies' exercise of their statutory authority pursuant to Sections 4(e) and 18 of the FPA to provide mandatory conditions and fishway prescriptions for hydroelectric licenses that the Commission issues pursuant to its FPA licensing authority. The Department of the Interior (DOI) and the Department of Agriculture/Forest Service (FS) share mandatory conditioning authority under section 4(e) for hydropower licenses within reservations of the United States; DOI and the Department of Commerce share mandatory conditioning authority under section 18 for fishways.

Under Section 4(e) of the FPA, licenses issued within reservations of the United States must contain such conditions as the Secretary of the department responsible for the supervision of the reservation deems necessary for the adequate protection and utilization of the reservation. Section 3(2) of the FPA defines reservation. Section 18 of the FPA gives the Secretaries of Commerce and Interior the authority to prescribe such fishways as deemed necessary. Section 1701(b) of the Energy Policy Act of 1992 provides a definition of fishway.

When a resource agency submits a condition pursuant to Section 4(e) and/or a prescription pursuant to Section 18, the Commission is, with certain exceptions¹, required to include the condition and/or prescription as a condition of any license issued, subject only to review of the

¹The applicability of 4(e) conditions to parts of a project not located on a reservation is an area of dispute and the subject of litigation.

Court of Appeals. Many substantive issues, which arise through a resource agency's exercise of mandatory authority, are beyond the scope of this document. However, several process issues are resolvable.

Issue 1: Applicants do not always understand the bases for mandatory conditions.

Proposed Solution: The resource agencies will use the Commission's pre-filing consultation process to provide as much information to the applicant as possible regarding their respective resource goals and objectives in the initial phase of consultation, prior to the initiation of requested studies. Thereafter, the agencies will use the consultation process to help define resource needs in view of the project impacts, the agencies' identified goals, and the results of identified studies. If the resource agencies submit mandatory conditions and/or prescriptions to the Commission, the resource agencies must submit the supporting administrative record. Administrative records include the substantial evidence in support of the condition or prescription.

Issue 2: Some applicants have raised concerns that they have few options to review DOI's and DOC's mandatory conditions or prescriptions until after the Commission issues a license and acts on a request for rehearing, and an appeal is filed before the Court of Appeals².

Proposed Solution: The Department of the Interior and the Department of Commerce have committed, through Federal Register Notice dated May 26, 2000, to a consistent mandatory conditions review process. While the content of this process is not yet determined, it will provide an opportunity to provide comments on and obtain meaningful review of agency conditions and prescriptions by the prescribing or conditioning agency. In general, the resource agencies will continue to endeavor to work with applicants in development of their mandatory conditions.

Issue 3: There is concern that if DOI and DOC provide a review process for mandatory authorities, it will delay the licensing process.

Proposed Solution: Where possible, DOI and DOC will seek to incorporate any review process into the Commission licensing process. To the extent possible, the Commission staff will cooperate with the agencies in developing and implementing the agencies' mandatory authority review process to help ensure that the licensing process proceeds efficiently and fairly to all parties.

Issue 4: Applicants and Commission staff express the view that resource agencies may not always coordinate among themselves before filing their mandatory conditions, prescriptions, and Section 10(j) recommendations, and there may be inconsistencies.

²The Forest Service already has a public review process for its 4(e) conditions.

Proposed Solution: The resource agencies have made an attempt, and will continue to make greater efforts, to coordinate among themselves and to eliminate, where possible, inconsistent conditions, prescriptions, and recommendations.

Issue 5: Although resource agencies try to coordinate mandatory conditions and prescriptions before they are filed, there may be times when filed conditions overlap or conflict. In addition, mandatory conditions and prescriptions may be inconsistent with, or different from, recommendations submitted under section 10(j).

Proposed Solution: To attempt to resolve overlapping or conflicting conditions, prescriptions, or recommendations that have been filed in response to the REA notice, FERC may use: (1) the NEPA clarification meeting or teleconference, if requested by the resource agencies in their comments on the REA notice; or (2) the 10(j) meeting.

Issue 6: It may appear to applicants that resource agencies do not consider the impact on project economics of the conditions/prescriptions they submit.

Proposed Solution: The resource agencies have committed to consider, where information is provided by the applicant, alternatives, including the least expensive alternative, that will meet agency management goals. This review will be included in the administrative record. In addition, this issue could be raised by the applicant and reviewed under the mandatory authority review process identified in the solution to Issue 2, above.

Issue 7: Some applicants have raised concerns that delayed submission of mandatory conditions and prescriptions may prolong the licensing process.

Proposed Solution: Where possible, resource agencies will continue their efforts to submit conditions and prescriptions within the time set by the Commission in the Ready for Environmental Analysis (REA). If the resource agencies are unable to submit conditions/prescriptions within that time, the resource agencies will strive to file preliminary conditions/prescriptions and a schedule for submittal of final conditions/prescriptions (see 18 CFR 4.34b(1)).

Issue 8: One of the reasons resource agencies may not meet the Commission's due date for filing mandatory conditions and prescriptions is that the REA notice, which allows 60 days from the date of the notice to file conditions and prescriptions, comes as a surprise.

Proposed Solution: As described in the Interagency Task Force Report on FERC Noticing Procedures in Hydroelectric Licensing, FERC will include a tentative schedule for issuing its REA notice in the initial scoping document and any necessary revisions in scoping document 2. When there is a need for additional information after scoping, FERC will indicate any necessary revision to the REA notice schedule in its additional information request.

Issue 9: Another reason resource agencies may not meet the Commission's due date for filing mandatory conditions and prescriptions is that they do not have adequate information to develop their conditions and prescriptions.

Proposed Solution: If the information the resource agencies need is necessary for the Commission's decision on the license application, the Commission staff will assist the agencies in obtaining the information necessary to develop their conditions or prescriptions.

SECTION 2: AGENCY RECOMMENDATIONS UNDER SECTION 10(J)

Under Section 10(j) of the FPA, licenses for hydroelectric projects must include conditions to protect, mitigate damages to, and enhance fish and wildlife resources, including related spawning grounds and habitat. These conditions are to be based on recommendations received from federal and state fish and wildlife agencies. The Commission is required to include such recommendations unless it finds that they are inconsistent with Part I of the FPA or other applicable law, and that alternative conditions will adequately address fish and wildlife issues. Before rejecting an agency recommendation, the Commission and the agencies must attempt to resolve the inconsistency, giving due weight to the agencies' recommendations, expertise, and statutory authority. If FERC does not adopt a 10(j) recommendation, in whole or in part, it must publish findings that adoption of the recommendation is inconsistent with the purposes and requirements of Part 1 of the FPA or other applicable provisions of law, and that conditions selected by FERC adequately and equitably protect, mitigate damages to, and enhance fish and wildlife. Resource agencies may also recommend conditions under Section 10(a)(1) of the FPA. However, the Commission may accept, modify, or reject those conditions under the comprehensive development standard of Section 10(a)(1) without attempting to resolve inconsistencies or making the findings required by Section 10(j).

Issues associated with the Section 10(j) process fall into four general categories:

(1) determination of whether recommendations are within the scope of Section 10(j); (2) clarification of the recommendations; (3) preliminary determination of inconsistency with the FPA; and (4) response to a preliminary determination of inconsistency. These issues are discussed below, together with suggested clarifications or improvements.

Determination of whether recommendations are within the scope of section 10(j)

Issue 1: The resource agencies do not always understand or agree with the Commission's determination of whether or not a recommendation is within the scope of Section 10(j).

Proposed Solutions:

1. The Commission staff will consider recommendations to be within the scope of Section 10(j) recommendations that meet all of the following criteria:

- timely filed; within 60 days of issuance of the notice that the application is ready for environmental analysis, or in the case of an alternative licensing process, within 60 days of issuance of the notice soliciting agency recommendations and terms and conditions (unless an extension of time has been granted);
- specific measures for the protection, mitigation, or enhancement of fish and wildlife resources affected by the project;
- made by the appropriate state and federal fish and wildlife agencies; and
- within the Commission's authority to implement.

The draft decision on the scope of section 10(j) is subject to review by the Commission in the licensing order.

2. Resource agencies should provide recommendations that are as specific and detailed as possible for the project under review, are developed in light of the Commission's criteria, and include information on the significance or value of the resource and the specific purpose, management objectives, and goals that the recommendations are designed to address.
3. Commission staff will explain in the 10(j) section of the draft environmental document and/or the 10(j) preliminary determination of inconsistency letter the reason why a recommendation was considered to be outside the scope of 10(j).
4. If resource agencies have concerns with the 10(j) scope determination, they will explain those concerns in their response to the preliminary determination of inconsistency letter.

Issue 2: Agencies often recommend studies in the context of their section 10(j) recommendations. The Commission staff considers some of these recommended studies as within the scope of section 10(j); others of these recommendations are considered under section 10(a). It is not always clear to resource agencies how the Commission staff determines whether or not a recommended study is within the scope of Section 10(j).

Proposed Solutions:

1. Consistent with its regulations and case law, the Commission staff will consider within the scope of Section 10(j) requests for studies which cannot be completed prior to licensing. Examples are studies that can be conducted only after the project is operating or would determine the success of mitigative measures.
2. The Commission staff will consider resource agency requests for pre-licensing studies that could be (or could have been) performed during pre-licensing under Section 10(a)(1).
3. Commission staff will explain in the draft environmental document the reason why a 10(j) study recommendation was considered to be outside the scope of 10(j).
4. If resource agencies have concerns with the 10(j) scope determination for studies, they will explain those concerns in their response to the preliminary determination of inconsistency letter.

5. Resource agencies are encouraged to include in study requests information regarding the significance and value of the studies.

Clarification of Section 10(j) Recommendations

Issue 1: The resource agencies sometimes find unclear Commission staff procedures for seeking clarification of agency recommendations.

Proposed Solutions:

1. Once the Commission staff determines that a recommendation is within the scope of section 10(j), the Commission staff will, when necessary, request clarification of agency recommendations. Specifically, the Commission staff will seek clarification of agency recommendations that are unclear or ambiguous, appear to be generic recommendations that might not apply to a specific project, or could be accomplished more appropriately in a manner that the agency may not have considered when making its recommendation. Commission staff will explain why the clarification is needed.
2. If a NEPA clarification meeting is held, Commission staff may use it to discuss 10(j) clarifications. (See Range of Alternatives, Solution 2, in the ITF Report on NEPA Procedures in FERC Hydroelectric Licensing.)
3. If clarification is needed and a NEPA clarification meeting is not held, Commission staff will request clarification of agency recommendations in writing as part of the 10(j) letter. If agencies believe discussion is needed, clarification may be discussed at the 10(j) meeting.
4. Resource agencies are encouraged to include supporting documentation to help clarify their recommendations.

Issue 2: Section 10(j) recommendations often include measures, such as minimum flows, reservoir levels, or ramping rates, that require monitoring and/or gauging. In ensuring compliance with these measures, the Commission might interpret them differently than the resource agencies.

Proposed Solution:

1. The resource agencies will be as specific as possible about exactly what measures they are recommending, and for what purpose, in order to inform the Commission's compliance efforts. For example, a minimum flow recommendation should contain information regarding where and how the flow should be measured, if known at the time of the recommendation, and whether the flow is needed for fish at all times or only certain times.

2. Commission staff will seek clarification if there is confusion as to how a measure should be implemented.

Preliminary determination of inconsistency with the FPA

Issue 1: The resource agencies sometimes find unclear the basis for the Commission staff's determination that a recommendation is inconsistent with the FPA or other law.

Proposed Solutions:

1. Commission staff, in making its preliminary determination of inconsistency, will give due weight to the recommendations, expertise, and statutory responsibilities of the resource agencies.
2. Commission staff will explain in its environmental documents and/or 10(j) letters the basis for the preliminary determination of inconsistency (i.e., this discussion will include an explanation of the specific inconsistencies with respect to: substantial evidence standard under 313(b) of the FPA; comprehensive development/public interest standard of Sections 10(a)(1) and 4(e) of the FPA; mandatory conditions submitted under other sections of the FPA, such as Sections 4(e) and 18; or conditions imposed under other applicable law, such as the Clean Water Act or the Endangered Species Act). Where the Commission staff's 10(j) letter offers an alternative recommendation, Commission staff will provide as much information as possible to allow meaningful evaluation by the resource agency.
3. Commission staff will issue 10(j) letters that, as appropriate, use the following format:
 - Include an introductory statement identifying those agency recommendations that Commission staff believes may be inconsistent with the FPA and those that the staff believes need clarification.
 - Explain in the letter, or provide a specific citation to the appropriate section in the draft environmental document which explains, the basis for the preliminary determination of inconsistency for each recommendation identified.
 - Explain in the letter, or provide a specific citation to the appropriate section in the draft environmental document which explains, why the recommendation appears to be inconsistent with applicable law(s), including, where appropriate, information on the effect of the recommendation on factors such as project generation, overall project economics, and other project purposes, as well as information on the cost of the individual measure and benefits to the resource.
 - Describe clearly any request for clarification of an agency recommendation.

- For the preliminary finding of inconsistency, include any pertinent questions to the recommending agency regarding the basis for its recommendation and whether it could support specified alternative recommendations.
- Describe the regulatory time frames for completing the 10(j) process and ask the agency whether it would like to discuss the preliminary findings of inconsistency, clarifications, or any other issues at a meeting or teleconference.
- Send a copy of the letter to the agency making the recommendations, the applicant, and the other entities on the Commission's service list.

Issue 2: The resource agencies sometimes find unclear the role of cost in the Commission's preliminary determination of inconsistency.

Proposed Solutions:

1. Commission staff will explain the basis of any preliminary determination of inconsistency in the 10(j) letter and/or the NEPA document. For instance, Commission staff will inform the resource agencies if the determination is based upon a balancing of the costs and benefits of the recommendation and will provide supporting analysis.
2. Resource agencies will provide any available information on cost that the agency considered.

Response to preliminary determination of inconsistency

Issue 1: Agency comments on the Commission's 10(j) preliminary findings and the draft NEPA document are typically due at the same time. This facilitates the Commission staff's review, because the 10(j) letter is based on information in the draft NEPA document, and additional information related to the agencies' 10(j) response often appears in their comments on the draft NEPA document. However, resource agencies sometimes have difficulty meeting these simultaneous deadlines, because it is difficult for them to gather additional evidence to support their 10(j) recommendations or do further analysis to consider alternative 10(j) recommendations and also prepare comments on the draft NEPA document within the typical 45-day time frame. Because of these concurrent deadlines, resource agencies sometimes do not file comments on draft EA's.

Proposed Solution:

1. To assist the Commission staff in its review, resource agencies will strive to meet the simultaneous deadlines for their 10(j) response letter and comments on the draft EA.
2. To assist resource agencies in anticipating when their 10(j) response letter and comments on the draft NEPA document will be due, the Commission staff will include a tentative schedule for issuance of the draft NEPA document in scoping document 1 and will include any necessary revisions in scoping document 2.

Issue 2: After the 10(j) meeting negotiations, there is typically no further discussion of the 10(j) issues between the Commission and the agencies. The Commission staff may not advise resource agencies in advance of what the issued order will hold. Therefore, resource agencies may not know how the 10(j) issues will be resolved until the order on the license application is issued.

Proposed Solutions:

1. Following the section 10(j) meeting, the Commission staff will continue to provide a summary, which will identify issues resolved at the meeting and those that remain unresolved.
2. The agencies may provide corrections or comments to the Commission staff on the summary of the section 10(j) meeting.

SECTION 3: OTHER ISSUES

Economics of Recommendations and Conditions

Issue: Resource agencies are concerned that some applicants may assert that a given mandatory condition, prescription, or recommendation would render a project uneconomic. The applicant may sometimes state that it will be unable or unwilling to accept a license that includes such a condition. This raises a number of issues for the resource agencies.

First, resource agencies are concerned that the applicants are singling out environmental recommendations and conditions as the items that financially break the project. The agencies and the Commission agree that appropriate environmental measures are a cost of doing business. The agencies and the Commission, however, may disagree as to which measures may be required to achieve appropriate environmental protection, mitigation, and enhancement. Second, while the agencies understand the applicants' interest in maintaining project profitability, the agencies' authority under the FPA is to provide conditions necessary to protect the affected resources, not to ensure the economic viability of the project.

Proposed Solutions:

1. Where information is in the administrative record, resource agencies currently do and will continue to take cost into account in developing conditions, whenever alternative, less expensive measures can provide protection that will meet the agencies' resource objectives.
2. Applicants are encouraged to suggest alternative conditions that achieve commensurate resource protection at lower cost, and should provide sufficient evidence to support the conclusion that the alternative would meet resource agencies' stated management goals, and at a lower cost.

Coordination of FPA Conditions with the ESA/Section 7 Process

Issue: Agency recommendations, conditions, and prescriptions under Sections 4(e), 10(a)(1), 10(j), and 18 are sometimes submitted without consideration of possible issues that may arise under the Endangered Species Act (ESA). As a result, formal consultation under Section 7 of the ESA may result in conditions that are inconsistent with, or different from, previously submitted agency recommendations, conditions, and prescriptions.

Proposed Solutions:

1. As described in the Interagency Task Force Report on Improving Coordination of ESA Section 7 Consultation with the Commission Licensing Process, resource agency ESA staff, as well as hydropower staff of the National Marine Fisheries Service and the Fish and Wildlife Service, as appropriate, will become involved early in the FPA pre-filing consultation process, to ensure that ESA issues are considered together with other issues.
2. In preparing their recommendations, conditions, and prescriptions, Service staff involved in the hydropower licensing process will coordinate, to the fullest extent practicable, both early in the FPA pre-filing stage and throughout the licensing process, with Service staff involved in ESA issues, to ensure that the FPA conditions will be consistent with the protective measures likely to be found necessary during ESA consultation. However, the Commission and the agencies recognize that additional or different measures may be necessary as a result of ESA consultation.

Enforceability of Settlement Agreements

Issue 1: Settlement agreements are an increasingly popular tool for resolving issues in hydropower relicensing proceedings in a timely and consensus-based manner. Settlements may provide benefits by: 1) allowing parties to consider non-traditional protection, mitigation, and enhancement measures; 2) providing opportunities for more immediate, on-the-ground action; and 3) expediting issuance of a new license.

Recent Commission decisions remind the parties that, although the Commission may approve or accept a settlement agreement, the Commission may not have the authority to enforce all the terms of settlement agreements, notably terms involving procedural rules for dispute resolution and other interactions among signatory parties (such as provisions that involve changes to future project management by stakeholder management groups, as in some forms of adaptive management or mitigation funding). Additionally, only the Commission has the jurisdiction to enforce provisions related to project operations or actions within project boundaries. For the federal resource agencies, therefore, the Commission is the only available forum for enforcement of settlement agreements affecting project operations and within project boundaries. For provisions which are not enforceable by the Commission, there are difficulties

for federal resource agencies that may prevent them from seeking enforcement elsewhere. For the resource agencies, this may raise questions about not only the viability of certain types of settlement provisions, but also the ultimate desirability of agency participation in pursuit of settlement agreements.

Proposed Solutions:

1. As indicated in the ITF Joint Statement of Commitment (May 22, 2000), the Commission staff will work to clarify the Commission's jurisdiction over, and enforcement policy regarding, settlements, so that participants in hydropower licensing settlements will have a clear understanding on what matters are within the Commission's jurisdiction.
2. To the extent possible, the Commission will designate members of its legal and technical staff to assist participants in determining what types of settlement provisions are likely to be acceptable to the Commission or to be included in the license as conditions that the Commission can enforce. In some instances, this staff will need to be separate from those members of the staff serving as advisors to the Commission. Participants in settlement agreements should be aware that the recommendations of Commission staff as to what is enforceable are not binding on the Commission.
3. If a settlement agreement is included as a mandatory license condition, the Commission will be unable to delete from the license those provisions of the settlement that are beyond the Commission's jurisdiction, in whole or in part, to enforce. However, as a general matter, participants contemplating settlement agreements should be aware that the Commission has discretion to accept, modify, or reject the terms of the settlement agreement. The Commission may issue a decision approving a settlement agreement, but will include as enforceable license conditions only those measures that are within the scope of the Commission's FPA authority.
4. In negotiating and developing settlement agreements, the Commission and the resource agencies will encourage the settlement parties to include in any settlement agreement to be filed with the Commission provisions that are enforceable by the Commission. Parties are encouraged to delineate separately those provisions assumed to be enforceable by FERC from those that are not.
5. The resource agencies encourage the Commission, through its licensing orders, to clearly identify any settlement provisions that are beyond its jurisdiction.

Issue 2: Rule 602 requires that an offer of settlement be served on all parties to the service list, and that they be provided with notification of the date comments on the settlement agreement are due. This time period is 20 days after the date of filing. In addition to this opportunity to comment, the Commission may publish notice of the settlement offer and invite additional public comment. This additional public comment period may add an element of uncertainty to the

settlement discussions because new issues may be raised, and the Commission may make changes to the conditions proposed for the license in the settlement agreement based on these comments.

Proposed Solutions:

1. Consistent with its regulations and basic due process principles, the Commission will likely publish notice and seek public comments on such agreements, because of the possibility that persons not involved in negotiating the agreement might have an interest that may be affected by the proposed settlement. The Commission will strive to provide this notice within 20 days of the settlement agreement filing.
2. The Commission considers measures and alternatives proposed during the licensing process in its NEPA documents. If a settlement is reached after the Commission has published its final NEPA document, the Commission may determine that there is a need to issue a supplement to its NEPA document if the proposed settlement includes measures that are not within the range of measures or alternatives already considered in the NEPA analysis.